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## INTERCOUNTRY ADOPTION IN INDONESIA

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### Abstract

*Indonesia regulates the Intercountry Adoption in its national law and regulation. Besides the Intercountry Adoption, it also regulates the adoptions which have foreign elements, yet excluded from the Intercountry Adoption pursuant to the national law. This writing shall What the requirements are and how the process is of those adoptions are the main topic of this writing, as well as the appliance of Principle of Nationality in those regulations. The research method of this writing is normative research to the prevailing rules and regulations includes the Indonesian district courts decisions which randomly taken. The result of this writing to opine the harmony or give advice, if any, upon the regulations of the intercountry adoptions and adoptions which contain foreign elements towards the Bill of Indonesian Private International Law.*

**Keywords:** Intercountry adoption, Indonesian adoption, Indonesian Private International Law

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## I. INTRODUCTION

Adoption in Indonesia involves several legal systems, namely Adat Law, Islam Law and National Law, which each of them is living and effective in Indonesia. Adoption according to each law is a different one to another; moreover, adoption in Adat Law has its own variation even legal consequences in each Adat society could be varied. Therefore, adoption in Indonesia is differed and has a lot of variation. One of them is the Intercountry Adoption, which regulated in the national law.

This writing will discuss the intercountry Adoption stipulated in the Indonesian national laws. The elaboration shall cover the legal basis, requirements, process and its legal consequences, as stated in Law No.4 of 1979 regarding the Child Welfare (hereinafter referred to as, the “**Law No.4 of 1979**”), Law No.23 of 2003 regarding the Child Protection (hereinafter referred to as, the “**Law No.23 of 2002**”), the Government Regulation No.54 of 2007 regarding the Procedure of Adoption (hereinafter referred to as, the “**GR No.54 of 2007**”), and the Regulation of Minister of Social No.110/HUK/2009 regarding the

Requirements of Adoption (hereinafter referred to as, the “**MS No.110 of 2009**”).<sup>1</sup> The Circular Letter of the Indonesian Supreme Courts will also be mentioned,<sup>2</sup> also the Bill of Private International Law issued by the National Law Development Agency (*Badan Pembinaan Hukum Nasional*) in 2015. The bill does not effective likewise the effective laws within Indonesia, yet it is presented herein as the common opinion of Private International Law’s scholars (*communis opinio doctorum*).

In line with the questions of Private International Law (hereinafter referred to as, “**PIL**”), this writing will try to answer two of three (or four) questions of PIL.<sup>3</sup> First, what is the applicable law of the intercountry

<sup>1</sup> Legal basis of adoption in Indonesia are: (1) Law regarding Child Welfare, Law No.4 of 1979, State Gazette No.32 of 1979, Supplement No.3143, (2) Law regarding Child Protection, Law No.23 of 2002, State Gazette No.109 of 2002, Supplement No.4235, as amended by Law regarding the Amendment to Law No.23 of 2002 regarding Child Protection, Law No.35 of 2014, State Gazette No.297 of 2014, Supplement No.5606; (3) Government Regulation regarding the Procedure of Adoption, Government Regulation No.54 of 2007, State Gazette No.123 of 2007, Supplement No.4768; (4) Presidential Decree regarding the Ratification of Convention On the Rights of the Child, Presidential Decree No.36 of 1990, State Gazette No.57 of 1990; (5) Regulation of Minister of Social of RI regarding the Requirements of Adoption, Regulation of Minister f Social No.110/HUK/2009; (6) Circular Letter of Supreme Court of RI No.2 of 1979 regarding Child Adoption jo. Circular Letter of Supreme Court of RI No.6 of 1983 regarding Perfection to the Circular Letter of Supreme Court No.2 of 1979 regarding Child Adoption; (7) Circular Letter of Supreme Court of RI regarding Child Adoption, Circular Letter No.4 of 1989; (8) Circular Letter of Supreme Court of RI regarding Child Adoption, Circular Letter No.3 of 2005; and (9) Circular Letter of Supreme Court of RI regarding the Obligation to Attach the Application of Child Adoption with the Birth Certificate, Circular Letter No.2 of 2009; (10) Compilation of Islam Law as circulated by Instruction of President of the Republic of Indonesia regarding the Compilation of Islam Law (*Kompilasi Hukum Islam*), Instruction of President of RI No.1 of 1991; (11) Law regarding Religion Court, Law No.7 of 1989 State Gazette No.49 of 1989, Supplement No.3400, as amended by Law regarding Amendment to Law No.7 of 1989 regarding Religion Court, Law No.3 of 2006 State Gazette No.20 March 2006, Supplement No.4611.

<sup>2</sup> Among others, the Circular Letter of Indonesian Supreme Court No.6 of 1983, the Circular Letter of Indonesian Supreme Court No.MA/KUMDIL/66/II/K/2005 dated 8 February 2005.

<sup>3</sup> Sudargo Gautama, *Pengantar Hukum Perdata International Indonesia* [translation from the author: *Introduction of Indonesian Private International Law*], (Bandung: Binacipta, 1987), p.8-10. Sudargo Gautama mentioned that the scope of PIL has four questions. The other two PIL questions or fields besides the above, are the status of foreigners and the nationality. See also M.H. Ten Wolde and K.C. Henckel, *European*

adoption in Indonesia, and second, which one is the authorized court to proceed the intercountry adoption. This writing will be closed with conclusions and recommendations, if any.

## II. DEFINITION OF INTERCOUNTRY ADOPTION

Child Adoption is defined in GR No.54 of 2007 as a legal action to move away or to shift a child from the authority of her biological parent(s), legal guardian, or any other party who has responsibility for taking care, educate and raising up the child, into a foster family.<sup>4</sup> While a foster child is defined as a child who is taken from the authority of her biological parent(s), legal guardian or any other party who has responsibility for taking care, educate and rising up the child, into a foster family based on a district court decision.<sup>5</sup> According to GR No.54 of 2007, Intercountry Adoption in Indonesia has two variations: (i) an Indonesian child who adopted by the foreign foster parents and (ii) a foreign child adopted in Indonesia by the Indonesian foster parents.<sup>6</sup>

Having considered the definition and variations mentioned above, the Indonesian Intercountry Adoptions can be deemed as a legal action that performed to move away a child from the authority of her biological parent, legal guardian, or any other party who has responsibility for taking care, educate and raising up the child, into a foster family within

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*Private International Law, A Comparative Perspective on Contracts, Torts and Corporations*, (Groningen: Hephestus, 2012), p.2, 5. The last question of questions of PIL is about whether a foreign judgement can be recognized or enforced.

<sup>4</sup> Indonesia, Government Regulation regarding Procedure of Adoption, No.54 of 2007, State Gazette No.123 of 2007, Supplement No.4768, Art.1 point (2). “*Pengangkatan Anak adalah suatu perbuatan hukum yang mengalihkan seorang anak dari lingkungan kekuasaan orang tua, wali yang sah, atau orang lain yang bertanggung jawab atas perawatan, pendidikan dan membesarkan anak tersebut, ke dalam lingkungan keluarga orang tua angkat.*” The same definition also mentioned in the lower regulation: Indonesia, Regulation of Minister of Social regarding the Requirements of Adoption, Regulation of Minister of Social No.110 of 2009, Art.1 point (2).

<sup>5</sup> Indonesia, Law regarding Child Protection, Law No.23 of 2002, State Gazette No.109 of 2002, Supplement No.4235, Art.1 point (9), jo. Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.* Art.1 point (1).

<sup>6</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.7, jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, Regulation No.110 of 2009, Art.1 point (7).

the territory of Indonesia, whereby one of the parties (either the foster parents or the foster child) have different nationalities and one of the parties has Indonesian nationality.<sup>7</sup>

### **III.PRINCIPLES & PROHIBITIONS OF INDONESIAN INTERCOUNTRY ADOPTIONS**

#### **A. PRINCIPLES OF INDONESIAN INTERCOUNTRY ADOPTIONS**

The principles of adoption are stipulated in the Law No.23 of 2002, as further specified in GR No.54 of 2007 and MS No.110 of 2009. Those principles are:

1. The best interest of the child

The first principle of adoption in Indonesia same as the general principles of adoption in the world, namely, the best interest of the child. The primary objective of the child adoption must be in order to create her welfare and protection.<sup>8</sup> Therefore, a child adoption cannot be conducted if it could harm or destruct the respective foster child. This principle is required to avoid any fraud or irregularity, for instance, an adoption without a correct procedure, falsification data, and or child trafficking or even trade of human organs.<sup>9</sup> This principle requires a long list of requirements, among others, the foster parents must give a statement that the adoption is in the best interest of the child.<sup>10</sup>

2. Foster parents and foster child have the same religion

The foster child must have the same religion with the foster parent.

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<sup>7</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.1 point (7). “*Pengangkatan Anak antara Warga Negara Indonesia dengan Warga Negara Asing adalah pengangkatan anak Warga Negara Indonesia oleh Calon Orang Tua Angkat Warga Negara Asing atau anak Warga Negara Asing oleh Calon Orang Tua Angkat Warga Negara Indonesia.*”

<sup>8</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, Art.39 (1), jo. Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.2, jo Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.2 (1) (a) and Art.3(1).

<sup>9</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Para.(4) of the Official Elucidation.

<sup>10</sup> *Ibid.*, Art.13 point (j).

In the event that the parent of the (prospective) foster child is unknown, the religion of the child is considered as the same with the religion of majority people in the respective village (*desa*) or sub-district (*kelurahan*) unanimously (*secara musyawarah*).<sup>11</sup> The last stipulation is applied if the child is a minor who has no capability yet to think and to have a responsibility, provided that proper and reasonable research has been performed.<sup>12</sup>

In several decisions, the Religion Courts or the District Court indicated the religions of the foster child from the biological parent(s). Nevertheless, in the cases that the child is abandoned in the hospital or the parent(s) are unknown, the judge gave an unclear indication to the religion of the baby foster child and usually left unsaid.<sup>13</sup>

### 3. Adoption does not detach blood relation

The child adoption does not detach the blood relationship between the foster child and her biological parent(s).<sup>14</sup> Therefore, at some point, the foster parents must inform the foster child about her history and or her biological parent(s).<sup>15</sup> The information must be explained with

<sup>11</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, Art.39 (3) and (5), jo. Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.3 and its Official Elucidation jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.2 (1) (c) and (d).

<sup>12</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, the Official Elucidation of Art.39 (5).

<sup>13</sup> The decisions of Indonesian District Courts, South Jakarta District Court Decision No.121/Pdt.P.2007/PN.Jak. Sel dated 14 May 2007, Decision of Religion Court of Gresik No.0066/Pdt.P/2011/PA.Gs dated 4 October 2011, Decision of Religion Court of Sidoarjo No.49/Pdt.P/ 2011/PA.Sda dated 2 May 2011, Decision of Religion Court of Pasuruan No.09/Pdt.P/2012/PA.Pas dated 12 March 2012, Decision of Religion Court of Bengkulu No.0015/Pdt.P/2010/PA.Bn dated 31 August 2010, Decision of Religion Court of Pekanbaru No.17/Pdt.P/2013/PA.PBR dated 11 April 2013, Decision of Religion Court of Slawi No.0070/Pdt.P/2010/PA.Slw dated 29 December 2010, Decision of Religion Court of Central Jakarta No.08/Pdt.P/2011/PAJP dated 30 March 2011. The author took these decisions issued after 2006 by random sample.

<sup>14</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, Art.39(2), jo. Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.4, jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.2(1)(b).

<sup>15</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, Art.40, jo. Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.6, jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*,

consideration of the readiness or promptness, either psychological or psychosocial, of the respective foster child. The foster child reaches such condition when she or he is around 18 years old, or can be different in any particular case.<sup>16</sup>

Legal consequences of this principle do not detail in the Indonesian regulations. However, Sudargo Gautama mentioned that since the blood relationship between the foster child and her biological remains exist, the foster child still has a chance to inherit from her biological parent(s) or vice versa. This regulation also shows that Indonesia is about to embrace the simple adoption or *adoption minus plena* that focuses on the care of a child for the best interest of the child, instead of a way to continue the descendant or *adoption naturam imitatuur*.<sup>17</sup> In the Moslem foster family, one of the consequences is the foster father cannot be the *wali nikah* of the bride who is a foster child.

#### 4. Ultimum Remedium

In addition to the above, the adoption of Indonesian foster children and the foreign foster parents can only be performed as an *ultimum remidium* or as a final resort. It can only be carried out if no Indonesian parent(s) would like to adopt the respective foster child.<sup>18</sup>

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Art.2(2).

<sup>16</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, the Official Elucidation of Art.40 (2).

<sup>17</sup> This adoption is to imitate the natural family by creating the relationship or affiliate between the foster parents and the child, and such relationship, though artificial yet it shall be considered as legal and have the same consequences as natural family relationship. See Sudargo Gautama, *Op.Cit.*, p.143-144.

<sup>18</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, Art.39 (4), jo. Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.5 jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.2(1)(e). See the Circular Letter of Supreme Court No.3 of 2005, states that child adoption can only be justified as *ultimum remidium*. "... *Adopsi anak oleh WNA dapat dibenarkan sebagai ultimum remidium. ...*" Those provisions are consistently stated that an Indonesian child can only be adopted by a foreign national(s) as a last resort. "*Pengangkatan anak Warga Negara Indonesia oleh Warga Negara Asing hanya dapat dilakukan sebagai upaya terakhir.*"



## B. PROHIBITIONS OF INDONESIAN INTERCOUNTRY ADOPTIONS

Single foreign foster parent is prohibited for Indonesian Intercountry Adoptions.<sup>19</sup> Only Indonesian single parent who obtains a prior permission from the Minister of Social Affairs of the Republic of Indonesia (hereinafter referred to the “**Minister of Social Affairs**”) is allowed for an adoption.<sup>20</sup> This requirement is in favour of the best interest of the child, as a child needs both parents similarly as a normal family to raise and grow up. Therefore, an adoption of a single parent can only be performed if he or she meets particular requirements.

The Indonesian regulations mention clearly that the same-sex couple(s) are prohibited to perform an adoption.<sup>21</sup> The way ahead for Indonesia to accept this issue is not clear yet if the author cannot say that it will take an extremely long period of discussion. First, it needs to gather the data as to whether or not the same-sex marriage is acceptable and could be established in Indonesia. Then, it needs further discussion as for whether Indonesia could be possible to show respect and tolerance for new family forms within which to raise children.

## IV. INTERCOUNTRY ADOPTION IN INDONESIA

The Indonesian Intercountry Adoptions must be performed through an authorized child care institution which then is solemnized by a district court decision.<sup>22</sup> The district court decision is required for validation purpose.<sup>23</sup> The process and requirements of those Indonesian

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<sup>19</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, the Official Elucidation of Art.16. Single parent is someone who does not engaged to any marriage or widow or widower.

<sup>20</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.16. The authority of the Minister of Social to give permission to a single parent could be delegated to the social institution at the province level.

<sup>21</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.13 (f).

<sup>22</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.11 (2) jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.14 point (c), Art.11 and 42.

<sup>23</sup> See Sudargo Gautama, *Op. Cit.*, p.148-150. the opposite side condition of the adoption pursuant to Adat Law. If there is no district court decision, the adoption shall be



Intercountry Adoptions will be in the discussion below.

## **A. THE REQUIREMENTS OF INDONESIAN INTERCOUNTRY ADOPTION**

Basically, the requirements of Indonesian Intercountry Adoption are the same with the requirements of domestic adoption. Only some particular requirements are applied to Indonesian Intercountry Adoptions.

The requirements of a foster child and foster parents of Indonesian Intercountry Adoption are consisting of two parts, the material or substance requirements, and the administrative requirements. The substance requirements are mention in GR No.54 of 2007 and MS No.110 of 2009, while the administrative requirements of those adoptions are detailed in MS No.110 of 2009. The administrative requirements are the documents which evidence that the parties are met the substance requirements in questioned. Those requirements both for the foster parent and the foster child will be discussed below.

### **1. The Requirements of prospective foster child**

#### **a) The requirement of Indonesian foster child**

The foster child of Indonesian Intercountry Adoption must meet all requirements according to prevailing rules and regulations. The prospective foster child must be under 18 years old. The child is neglected or abandoned and needs particular protection. Further, the regulation mentioned that neglected or abandoned child is a child whose her reasonable needs, whether physical, mental spiritual or social, are not fulfilled.<sup>24</sup> The other requirement is that the foster child lives or is in an authorized child care institution.<sup>25</sup>

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deemed as null and void. Those stipulations close the possibility of Adat Law or Islam Law to be applied. In relation to the jurisdiction, as mentioned above, the district court is the authorized and competent ones.

<sup>24</sup> Indonesia, Law regarding Child Protection, *Loc. Cit.*, Art.1 point (6) jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.1 point (13).

<sup>25</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.12 (1) jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.11.

The range of age of the foster child is divided into three priority categories. The foster children under 6 years old are placed on the first priority for adoption. The foster children of 6 up to 12 years old could be adopted for an urgent reason (*“ada alasan mendesak”*). The urgent reasons (*“ada alasan mendesak”*) are the condition whereby the prospective foster children are the victims or survivors of the natural disaster or refugee etc. The foster children between 12 up to 18 years old can be only adopted as long as they need particular protections (*“memerlukan perlindungan khusus”*). The child with particular protections (*“memerlukan perlindungan khusus”*) are the children who are dealing with law, the children from minority group and isolated group, the children who suffer in economic and/or sexual exploitation, the children in trade, the children who are the victims of drug abuse, alcohol, psychotropic and other addictive substances<sup>26</sup>; the children who are victims of kidnapping or trading; the children who are victims of physic or mental abuse; the children with disabilities; and the victims of mistreatment and neglected.<sup>27</sup>

The above requirements are applied to Indonesian prospective foster children. These requirements also applied to the children who are deemed to have Indonesian nationality, pursuant to the Law No.12 of 2006, hereinafter referred to as the **“Nationality Law”**.<sup>28</sup>

<sup>26</sup> “... narkotika, alkohol, psikotropika, dan zat adiktif lainnya (napza); ...”.

<sup>27</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, the Official Elucidation of Art.12.

<sup>28</sup> Indonesia, Law regarding Nationality, Law No.12 of 2006, State Gazette No.63 of 2006, Supplement No.4634, Art.4 point (2) until (13). Those children are the children who born from legal marriage between an Indonesian father and mother; or Indonesian father and foreign mother; or foreign father and an Indonesian mother; or an Indonesian mother and a stateless father or whose his country does not provide automatic nationality; or children who born within 300 days after her legal Indonesian father is passed away; the illegitimate children from Indonesian mother; the illegitimate children of foreign mother who acknowledge as the children of Indonesian father provided that the acknowledgement is made before the children is 18 years old or not yet marriage; the children who born within the territory of Indonesia whose the parents have unclear nationality at the time of her birth; the newly babies who are born within the territory of Indonesia of un-known parents; the children born within the territory of Indonesia from the stateless parents or from parents who their existence are unknown; the children who born outside of the territory of Indonesia of the Indonesian parents and according to her where she was born to have the Indonesian nationality; the children from parent who were approved to have Indonesian nationality but then

## b) The Requirements of the Foreign Foster Child

GR No.54 of 2007 mentions that an adoption of a foreign foster child must obtain the written approval from the government of the national country of the respective foster child. MS No.110 of 2009 mentioned that the foreign foster child who is in Indonesia subject to the requirements of her national state.<sup>29</sup> This reflected that the requirements from the original state are applied to her, as in line with the Principle of Nationality which prevails in Indonesia.<sup>30</sup>

## 2. The Requirements of Prospective Foster Parents

### a) The Requirement of Indonesian Foster Parents

The prospective Indonesian foster parents could perform adoption if they meet all requirements as stipulated in the prevailing rules and regulations. The parents must be in healthy conditions, both physically and mentally and at least 30 years old while maximum 55 years old. The parent has the same religion with the prospective foster child; good behaviour and has never been convicted of committing any crime; in marriage at least 5 years, and they are not a gay or lesbian couple or the same-sex couple. They have no children, or not yet have any child or only have one child. The foster parents must have the approval from the foster child if the child is capable to state her opinion and the approval from the biological parents or her guardianship. They must be in a good financial and social condition. They also must sign a written statement that the adoption is performed for the best interest of the child, and for her welfare and protection reasons. They need to obtain a report from the relevant social institution that they have taking care of the child at least 6 months, as of the date of permission; and obtain an approval from the Minister of Social and/or the chairman or relevant

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passed away before he or she could give the oath.

<sup>29</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.47(2).

<sup>30</sup> Art.16 AB regarding status personal. “*De wettelijke bepalingen betreffende den staat en de bevoegdheid der personen blijven verbindend voor ingezetenen van Nederlands-Indië, wanneer zij zich buiten's land bevinden.*” [The legal provisions concerning the State and personal authority remain binding for residents of the Dutch East Indies whenever they are abroad.]

social institution.<sup>31</sup>

b) The requirements of foreign foster parents

The above requirements also applied to any foreign foster parents. In addition, they must have a written approval from their national state through its embassy or representative office in Indonesia.<sup>32</sup> The prospective foreign foster parents who are foreigners must have a valid legal domicile in Indonesia at least 2 years. They must sign a statement that they will give written a report about the development of the foster child at least once a year through the Indonesian Embassy or its representative office in their country until the child is 18 years old.<sup>33</sup>

## **B. PROCESS OF INDONESIAN INTERCOUNTRY ADOPTIONS**

The Indonesian Intercountry Adoptions must be conducted through an authorized child care institution which has permission to do so,<sup>34</sup> any private adoption is prohibited.

### **1. Adoption of an Indonesian Foster Child in Indonesia by the Foreign Foster Parents**

The process of this adoption is started when the foreign foster parents submit a request to have a permission of child care ("*izin pengasuhan anak*") to the Chairman of Social Institution at Province level attached with all administrative requirements as required.<sup>35</sup> The chairman will assign an officer from his office and an officer of the child care institution to carry out feasibility by visiting the house of the foreign foster parents. Based on the feasibility study, the chairman will issue a temporary permission of child care. The officer from the Social Institution will conduct guidance and supervision during the temporary

<sup>31</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.13.

<sup>32</sup> *Ibid*, Art.14 (a).

<sup>33</sup> *Ibid*, Art.17 and Art.40.

<sup>34</sup> *Ibid*.

<sup>35</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.22, jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.41 and Art.46. The attachments of thereto are the documents that are proofing the respective foreign foster parents are met all the requirements.

childcare.

After the above process, the foster parents (or its proxy) continue the process by submit a request on paper with sufficient stamp duty to adopt the foster child to the Chairman of Social Institution at province level, while the officer from the Social Institution and the officer of the childcare institution keep conducting the house visitation to supervise the development of the foster child in the foreign foster family, which at least for the period of 6 months. Based on this request, the Chairman will examine the documents of the foster parents with Adoption Advisory Team (*Tim Pertimbangan Pengangkatan Anak*, hereinafter referred to as the “**PIPA**”) at province level. The Chairman will issue a recommendation letter for any further process in the Department of Social.

The Minister of Social Affairs then examines the feasibility of the foreign foster parents and any relevant documents on the forum of PIPA at the Department of Social. PIPA at this level issues a decision letter with regard to the respective child adoption and then the Minister of Social will issue a License of Child Adoption (“*Izin Pengangkatan Anak*”) as a recommendation to be further determined by the relevant district court. If the request of child adoption is refused, the child will be re-sent to the previous child care institution. If the request is granted by the district court, the foster parents must report and give the copy document to the Department of Social and Civil Registry Office of the Republic of Indonesia (herein referred to as the “Department of Social”). The Department of Social will record and make documentation of the respective child adoption.

GR No.54 of 2007 also mentions that the documentation will be conveyed to some Indonesian institutions, namely the Supreme Court through the clerk or of Supreme Court, the Department of Social, the Department of Law and Human Rights through the Directorate General of Immigration, the Department of Foreign Affairs, the Department of Health, the Department of Domestic Affairs, the Supreme Prosecutors and the Police of the Republic of Indonesia.<sup>36</sup>

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<sup>36</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, the Official Elucidation Art.22.

## 2. Adoption of a Foreign Foster Child in Indonesia by the Indonesian Foster Parents

The process mentioned in point IV.B.1 above is also applied to this particular adoption.<sup>37</sup> GR No.54 of 2007 and MS No.110 of 2009 requires that both parties are in Indonesia.<sup>38</sup> GR No.54 of 2007 stipulates that the above stipulations simultaneously apply to the adoption of a foreign foster child by the Indonesian foster parents. It means the basic principle of the process, an authorized a child care institution and the district court decision is a must.<sup>39</sup>

MS No.110 of 2009 mentions that the requirements and the process of the foreign foster child in Indonesia by the Indonesian foster parents must follow and subject to the requirements and process of the national state of the foreign foster child.<sup>40</sup> Besides it, MS No.110 of 2009 requires that each of the written approval from the government of Indonesia and the foreign government of original foster child must be according to the prevailing regulations.<sup>41</sup> Furthermore, this adoption must be reported to and registered at the authorized institutions with a copy to the Department of Social.<sup>42</sup>

If we read those regulations, the stipulations between GR No.54 of 2007 and MS No.110 of 2009 seems not in line each other. Yet, it could be seen that the Indonesian regulation requires that both law, the Indonesian law and foreign law, to be applied at the same time.

In relation to the above, the author humbly suggests reading those stipulations in line with the principle of PIL adopted in Art.16 AB and 18 AB. The substance requirements to the foreign foster child, that must be in line with the law of the national foreign foster child, is acceptable pursuant to the Principle of Nationality adopted by Indonesia. Yet, the foreign foster child is also subject to the requirements as stated in GR

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<sup>37</sup> *Ibid.*, Art.23.

<sup>38</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.47 (1)(c).

<sup>39</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.23.

<sup>40</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.47(2) jo. Art.49.

<sup>41</sup> *Ibid.*, Art. 48(1).

<sup>42</sup> *Ibid.*

No.54 of 2007 as she is having her habitual residence in Indonesia. In this situation, the adoption requirements, based on the Principle of Nationality and the Principle of Habitual Residence, are cumulatively applied to the foreign foster child.

In relation to the solemnization process, the author agrees with the stipulations described in GR No.54 of 2007 that it must be according to the Indonesian regulations, instead of MS No.110 of 2007 which stated it must be according to the stipulations of the original state of the foreign foster child. It is in line with the principle of PIL, “*lex loci celebrationis*”, reflected in Art.18 AB whereby the process of legal action is valid according to the law where legal action is performed.<sup>43</sup>

In relation to this situation, the author expected that judges will give its decision according to GR No.54 of 2007 instead of MS No.110 of 2009. First, the GR No.54 of 2007 is the regulation that has the higher level which makes any contradiction from lower regulation shall be deemed to be not applicable. Second, the regulation of GR No.54 of 2007 is in line with the principle of PIL.

## **V. ADOPTION WITH FOREIGN ELEMENTS**

MS 110 of 2009 mentioned another adoption which has foreign elements, yet it does not include in the above Indonesian Intercountry Adoptions stipulated in GR No.54 of 2007. There are several situations which will be detailed and described below.

### **A. ADOPTION OF INDONESIAN FOSTER CHILD BY THE FOSTER PARENTS WHO ONE OF THEM IS FOREIGNER (WITHIN INDONESIA)**

That is the adoption of Indonesian foster child by the foster parents who one of them is foreign national.<sup>44</sup> The requirements of the Indonesian foster child and the foster parents are the same with the Indonesian Intercountry Adoptions, for instance, the adoption must be from an authorized child care institution or the marriage between the

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<sup>43</sup> Art.18 AB.

<sup>44</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.36-41.



foster parents must be at least 5 years.<sup>45</sup> The variation is only for the requirement of the foster parents. In addition to the requirements of the foreign foster parents, the approval from the biological parent(s) of the foster parents is required, yet the foreign parent (either mother or father) does not require to have a domicile in Indonesia for at least two years.<sup>46</sup> The author imagines that the legal background of this stipulation that his/her spouse in their legal marriage already becomes the guarantor for him or her.<sup>47</sup>

## **B. ADOPTION OF INDONESIAN FOSTER CHILD WHO IS ABROAD BY THE FOREIGN FOSTER PARENTS (WITHIN INDONESIA)**

This particular situation is, as mentioned in point IV.B.1, stipulated in GR No.54 of 2007. It stipulates that an adoption of an Indonesian child born (a) within the territory of RI or (b) outside the territory of RI by foreign foster parents who are abroad must be conducted within the territory of Indonesia and the Indonesian foster child must fulfil all requirements as stated in the Art.12 of GR No.54 of 2007.<sup>48</sup> In relation to the process of adoption, GR No.54 of 2007 is silent; it generally mentions that it must be performed in Indonesia.

MS No.110 of 2009 further mentions similar that Indonesian foster child who is abroad and needs particular protection<sup>49</sup> can be adopted

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<sup>45</sup> *Ibid.*, Art.36, Art.38.

<sup>46</sup> *Ibid.*, Art. 38.

<sup>47</sup> Indonesia, Law regarding Immigration, Law No.6 of 2011 State Gazette No.52 of 2011, Supplement No.5216, Art.63 (4).

<sup>48</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.24. “*Pengangkatan anak Warga Negara Indonesia yang dilahirkan di wilayah Indonesia maupun di luar wilayah Indonesia oleh Warga Negara Asing yang berada di luar negeri harus dilaksanakan di Indonesia dan memenuhi persyaratan sebagaimana dimaksud dalam Pasal 12.*” Jo. Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.52.

<sup>49</sup> See the definition in sub-chapter 4.1.1.1 above, those are the children who are dealing with law, the children from minority group and isolated group, the children who suffer in economic and/or sexual exploitation, the children in trade, the children who are the victims of drug abuse, alcohol, psychotropic and other addictive substances; the children who are victims of kidnapping or trading; the children who are victims of physic or mental abuse; the children with disabilities; and the victims of mistreatment and neglecting.

by the foreign foster parents who are also abroad, provided that the requirements and the process of adoption are subjected to the rules and regulations described in it.<sup>50</sup>

Furthermore, MS No.110 of 2010 mentions that this child adoption must obtain the written approval from the government of the Republic of Indonesia through its representative office where both parties having their domicile. The legal documents of child adoption from the original state of foster parents is legalized by the department of foreign affairs of the state and further to be seen or known by the Indonesian representative in that State for then legalized by the Department of Foreign Affairs and the Embassy of origin state of foster parents in Jakarta and the Department of Law and Human Rights. This child adoption must be reported in writing at least once a year to the Indonesian representative office where they are having their domicile. The foster parents must allow a team of PIPA to conduct visitation to supervise the development of the foster child. The foster child for temporary could be placed in the local childcare social institution which has permission from the local government to do so until the foster parents acquire the local district court decision of the respective child adoption.<sup>51</sup>

MS No.110 of 2010 answers the silence of GR No.54 of 2007 which only states that the Indonesian foster child is subject to the substance requirements described in it. MS No.110 of 2009 gives an exception that it could be performed where both parties have their habitual residence.

It is a big possibility that a child who is born outside of the territory of RI, is staying outside of the territory of Indonesia where she was born. It means that the respective child is having her legal domicile or habitual residence abroad. The foreign foster parents are (or could be) not within the territory of Indonesia. Therefore, the knot with Indonesia is only her nationality. With the above conditions, the parties to such adoption are more likely remain to stay outside of the territory of RI where they are having their domicile or habitual residence in the first place.

If the adoption is strict with GR No.54 of 2007, it means that the

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<sup>50</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.51, 52.

<sup>51</sup> *Ibid.*, Art. 52(1).

Indonesian foster child must be taking back to Indonesia, also the foreign foster parents must come to Indonesia and establish their valid legal domicile at least 2 years in Indonesia. This kind of adoption is very risky to be criss since the habitual residence of the parties to adoption is abroad and the only point of contact with Indonesia is the nationality of the foster child.

Such adoption process will cost enormous expenses and time, due to the process before the court and the building of legal domicile of parents at least 2 years. The process could be ineffective. There will be a possibility that the adoption can be conducted before the court where both parties are having their habitual residence, in which any recognition or enforcement of the foreign judgment will not be an issue.

MS No.110 of 2009 gives a possibility to perform adoption, however, it still seems to be different with the main regulation as mention in GR No.54 of 2007. In relation to this, it advisable that GR No.54 of 2007 to be amended to give the chance to perform this adoption outside of the territory of Indonesia as MS No.110 of 2009 already stipulated, to avoid any doubt. In addition, it is in line with the principle of PIL, of “*lex loci celebrationis*”. Considering that Indonesian regulation is focused on the best interest of the child, it will be advisable if the Indonesian provision is stipulated that the child could be adopted according to where she is having her habitual residence. It will be more efficient and will not be peculiar since the international convention of intercountry adoptions is also having the same approach.<sup>52</sup>

### **C. ADOPTION OF INDONESIAN FOSTER CHILD BY THE INDONESIAN FOSTER PARENT(S) WHO BOTH ARE ABROAD**

In relation to this situation, GR No.54 of 2007 is silent, while MS No.110 of 2009 mentions that the requirements of adoption, who both parties are Indonesian nationals while they are abroad, are subject to Indonesian prevailing rules and regulations. Art.50 of MS No.110 of 2009 clearly mentions that it must be performed within the territory of

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<sup>52</sup> The International convention of Convention on Jurisdiction, Applicable Law & Recognition Decrees relating to the adoptions, 1965

the Republic of Indonesia.<sup>53</sup> Art.52 of MS No.110 of 2009 mentions the possibility to perform the mention the requirements and the process must be according to the stipulations described in MS No.110 of 2009, yet gives additional requirement if it performed outside the territory of Indonesia.<sup>54</sup>

It states that the child must obtain the written approval from the government of the Republic of Indonesia through its representative office where both parties having their domicile. The legal documents of child adoption from the original state of foster parents is legalized by the department of foreign affairs of the state and further to be seen or known by the Indonesian representative in that State for then legalized by the Department of Foreign Affairs and the Embassy of origin state of foster parents in Jakarta and the Department of Law and Human Rights. This child adoption must be reported in writing at least once a year to the Indonesian representative office where they are having their domicile. The Indonesian foster parents must allow a team to conduct visitation to supervise the development of the foster child. The foster child for temporary could be placed in the local childcare social institution which has permission from the local government to do so until the foster parents acquire the local district court decision of the respective child adoption.<sup>55</sup>

The above stipulations give opportunity that this adoption could be solemnized where they are having their domicile or habitual residence, instead of as an obligation that it has to be performed within the territory of Indonesian. It is advisable that GR No.54 of 2007 and MS No.110 of 2010 gives clear and direct stipulations that those are in line with the principle of “*lex loci celebrationis*”, whereby the process must be according to the regulation where the adoption is performed or taken place.

In relation to the solemnization process of adoption, Civil Administration Law is silent as to whether the foster parents are obliged to conduct a registration upon the adoption in question at the Civil

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<sup>53</sup> Indonesia, Regulation of Minister of Social regarding Requirements of Adoption, *Loc. Cit.*, Art.50 (1).

<sup>54</sup> *Ibid.*, Art.52.

<sup>55</sup> *Ibid.*

Registration Office when they arrive in Indonesia.

#### **D. ADOPTION OF FOREIGN FOSTER CHILD BY INDONESIAN FOSTER PARENTS WHO BOTH ARE ABROAD**

GR No.54 of 2007 does not stipulate this adoption. However, the obligation to report and register this adoption which held abroad is found in the Civil Administration Law.<sup>56</sup> It mentioned that adoption of a foreign foster child by the Indonesian foster parents who both are abroad must be registered at the authorized institution where such adoption is performed. Such adoption must be reported to the Indonesian Embassy or Indonesia representative office in the respective state. In the even no authorized institution for adoption registration, then the Indonesian national must report the same to the Indonesian Embassy or its representative office in such state, to acquire a Statement Letter of Child Adoption (“*Surat Keterangan Pengangkatan Anak*”). Within 30 days as of their return to Indonesia, the foster parent obliges to report such adoption to the local Civil Registry Office for confirmation of the Statement Letter of Child Adoption which they have obtained abroad.<sup>57</sup> Any delay to the report shall be fine in the amount of IDR1 million, but it will not cause any invalidity to such adoption.<sup>58</sup>

One question remains, what is the applicable law and which court is authorized to solemnize the adoption. Since there are no stipulations to answer those questions, pursuant to the Art.16 AB is applied to answer the applicable law. The national law of each party is applied to each of them in relation to the substance requirements. In relation with the solemnization, Art.18AB is applied therefore the adoption is valid if it is according to the law where the adoption is performed.

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<sup>56</sup> Indonesia, Law regarding the Civil Administration, Law No.23 of 2006, State Gazette No.124 of 2006, Supplement No.4674, as amended to date.

<sup>57</sup> *Ibid.*, Art.48.

<sup>58</sup> *Ibid.*, Art.90.

## **E. ADOPTION OF FOREIGN FOSTER CHILD BY FOREIGN FOSTER PARENTS WHO ALL OF THEM ARE IN INDONESIA**

In relation to the above situation as the last variation of the intercountry adoption, GR No.54 of 2007 is silent. However, there was an interesting case in 1989 upon the adoption which conducted by the foreign foster child and foreign foster parents in Galang Island. Such decision is described in Decision of Tanjung Pinang District Court No.205/Pdt.P/P/N/FPAT dated 20 May 1989. This case was started when a Canadian couple, who stayed in Galang Island, Indonesia,<sup>59</sup> submitted a request to adopt a Vietnamese girl before Tanjung Pinang district court.

The foster child was Vietnamese girl who was 12 years old. Her father was one of the refugees in Galang Island and her mother suffered from mental illness and then committed suicide. The foster parents were Canadian Nationals who have been stayed on the same island for a year and 8 months as volunteer of United Nations. They submitted a request to adopt this Vietnamese's girl before the Tanjung Pinang District Court as the authorized district court where both parties had their habitual domicile.

The judge stated that this case was a PIL case. The judge considered and referred to the stipulations The Hague Convention of 1965 (Convention on Jurisdiction, Applicable Law & Recognition Decrees relating to the adoptions, 1965). Even though that Indonesian does not a contracting state to such the International Convention, the judge was considered such stipulations as the case was involving foreign parties, either foster parents or the foster child. The judge mentioned that he had valid legal jurisdiction since both parties were having their habitual residence in his jurisdiction, in line with the stipulations stated in Art.3(a) of such Convention.<sup>60</sup>

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<sup>59</sup> Galang Island (Indonesia) is located in south of Batam Island. It was one of designated places for refugees from Vietnam who were coming between 1979-1996, called as "*Manusia Sampan*". UNHCR built camps and facilities to help those refugees which then closed in 1997.

<sup>60</sup> Art. 3(a) of Convention on Jurisdiction, Applicable Law & Recognition Decrees relating to the adoptions, 1965. "Jurisdiction to grant and adoption is vested in one of the authorities of the state, where the adopter habitually reside or, in the case an adop-

The next consideration is about the applicable law. The judge mentioned that Indonesian law was not the applicable law since both parties were foreigners and they were not domiciled in Indonesia at least for 2 years yet. The judge then considered the national law of the parties as the applicable law. The judge considered that the foster child would be taken to Canada by the foster parents, therefore the centre of gravity would be on the foster parents who were Canadian nationals. The judge mentioned that the law of Canada is an applicable law for the case, and for the solemnization of the adoption shall be according to the Indonesian Law, where the legal action was taken.<sup>61</sup>

After considered the requirement of Canadian law which advised by the Canadian Government, the judge stated that this adoption was not in contradiction with the law of the foster child, in this case, was the Vietnam Law. The request for adoption from the Canadian couple was granted.

This case had positive notes from Sudargo Gautama. This case was considered to be a case whereby the principles of intercountry adoption mentioned in the international convention of 1965 were applied correctly, even though Indonesia was not a contracting state. The judge considered respected and considered the principles of intercountry adoption when he was about to choose the applicable law. The judge did not directly mention that the Indonesian law although it was the *lex fori*.

## **VI. LEGAL CONSEQUENCES OF INDONESIAN INTERCOUNTRY ADOPTIONS**

### **A. ADOPTIO MINUS PLENA OR ADOPTIO PLENA**

A child adoption at Indonesia national level which includes the Indonesian intercountry adoption does not detach the blood relationship between the foster children with her biological parents.<sup>62</sup> In this case,

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tion by spouses, the authorities of the state in which both habitually reside.”

<sup>61</sup> The judge clearly set aside the requirement of Indonesian Law for intercountry Adoption at that time, whereby the foster child in maximum is 5 years old. It shows that the Canadian Law is applied and considered in this case.

<sup>62</sup> Indonesia, Government Regulation regarding Procedure of Adoption, *Loc. Cit.*, Art.4.



it means that the national law of RI absorb the principle of *adoptio minus plena* or simple adoption in which the legal consequences will not operate too excessive. For instance, it will not cause any right to inherit from the foster parent. These consequences of the legal adoption are explaining why the foster child must be informed her ascendant or biological parents by considering the readiness and mental condition of the respective foster child.

Yet, it does not mean that all adoptions in Indonesia are a simple adoption. The adoption of Adat Law, in contrary, has the legal impact that detaches the relationship between the foster children with her biological parents, pursuant to the particular Adat Law. A new legal relationship arises between the foster child and the foster parent in whom the child is entitled to inherit from the foster parents in the future.<sup>63</sup> Having considered the above, it suffices to remark that simple adoption or *adoptio minus plena* and *adoptio plena* both are applied within the territory of Indonesia.

## **B. THE NATIONALITY OF FOSTER CHILD**

The Nationality Law stated that a foster child below 5 years old who is legally adopted by the foreign foster parents based on a district court decision is recognized as having Indonesian nationality.<sup>64</sup> The foreign foster child under 5 years old who is legally adopted by the Indonesian foster parents based on a district court decision is obtaining the Indonesian nationality.<sup>65</sup>

Any foreign child below 5 years old who legally and validly adopted based on a district court decision by the Indonesian parents, shall have Indonesian nationality. This stipulation is the same as the previous Indonesian nationality law, namely the Law No.62 of 1958 as amended. The legal background of determination of “below 5 years old” in the previous nationality law is to avoid any sneak in the acquisition of Indonesian nationality through an adoption.<sup>66</sup> The author believes that

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<sup>63</sup> Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia [Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia]*, (Jakarta, Pustaka Alvabet, 2008), p.392-395.

<sup>64</sup> Indonesia, Law regarding Nationality, *Loc. Cit.*, Art.5 (2).

<sup>65</sup> *Ibid.*, Art.20.

<sup>66</sup> Sudargo Gautama, *Op.Cit.*, p.145.

the current stipulation in National Law, not only has the same stipulation but also has the same background.

If the above stipulations cause the foster child has double nationality, she/he can choose one of the nationalities when she/he turns into 18 years old or younger provided she/he is married.<sup>67</sup> This option is open for 3 years since she turns 18 years old or the date of her/his marriage. Her/his option to be Indonesian national must be done in writing to the authorized officer along with required documents.

## VII. INTERCOUNTRY ADOPTION ACCORDING BILL OF 2015<sup>68</sup>

In 2015, a new bill on PIL was again discussed,<sup>69</sup> and issued by the National Law Development Agency (*Badan Pembinaan Hukum Nasional*) under the Department of Law and Human Right of RI, as an academic bill. This bill known as the “Bill of 2015”. The adoption in this Bill is mentioned in Chapter VI. It states that:

*“Pengangkatan anak tunduk pada hukum nasional dari pihak yang mengangkat dan anak yang diangkat, apabila mereka mempunyai kewarganegaraan yang sama. Apabila pihak yang mengangkat dan anak*

<sup>67</sup> Indonesia, Law regarding Nationality, *Loc. Cit.*, Art.6.

<sup>68</sup> Tiurma M. Pitta Allagan, “The Bill on Indonesian Private International Law”, *The Netherlands Private International Law 2015 No.33/3*, Den Haag: T.M.C. Asser, 2015, pp.390-403.

<sup>69</sup> The team produced the first academic bill on PIL which was known as the Bill of 1983. The Bill of 1983 was discussed on several occasions in different meetings, and it was revised and reissued in 1997, becoming known as the Bill of 1997. The Bill of 1997 was prepared on an article by article basis and was followed by an official elucidation, which included references to some international conventions, for instance, the inter-country adoption and international inheritance conventions.

However, the need for operational legislation which is directly applicable to daily life resulted the government of Indonesia gave less priority to those Bills; those Bills may well serve as a restatement of and the common opinion of PIL scholars (*communis opinio doctorum*) on Indonesian PIL.

At this moment, the complete text of this Bill is available in the book by Sudargo Gautama, *Hukum Dagang dan Arbitrase Internasional [translation by the author: International Commercial and Arbitration Law]*, (Bandung: Citra Adhitya Bakti, 1991), Annex 8. Those articles provide the stipulations of the questions of PIL that are the applicable law and applicable jurisdiction.

*yang diangkat mempunyai kewarganegaraan yang berbeda, kemampuan dan syarat-syarat bagi pengangkatan anak yang ditentukan oleh hukum dari Negara tempat anak yang bersangkutan mempunyai tempat kediaman (sehari-hari).*

*Pengangkatan anak ini dititikberatkan pada tempat kediaman sehari-hari dari anak. Prinsip ini telah diterima pula dalam Konvensi Hukum Perdata Internasional Den Haag tahun 1965 (Convention on Jurisdiction, The Applicable Law and Recognition of Decrees relating to Adoption), jika terdapat kewarganegaraan yang sama antara orang yang mengangkat dan yang diangkat, maka hukum nasional yang dipakai.*

*Akibat hukum dari pengangkatan anak, baik yang mengenai pihak yang mengangkat maupun anak yang diangkat, tunduk pada hukum dari Negara tempat anak yang bersangkutan mempunyai tempat kediaman (sehari-hari) [sic!]. Mengenai hak dan kewajiban antara anak yang diangkat dan keluarga yang melahirkan anak tersebut tunduk pada hukum dari negara tempat anak yang bersangkutan mempunyai tempat kediaman (sehari-hari)."*

The unofficial translation from the author of the above stipulations is as follows: "Any intercountry adoption is subject to the national law of the foster parents and the foster child if they have the same nationality. If the foster parents and the foster child have different nationality, the capacity and requirements of adoption are subject to the law of the state where the foster child in concerned has her (habitual) [sic!] residence. The child adoption is centralized at the place where the child has her residence in daily life. This principle is accepted in the PIL Convention of the Hague of 1965 (*Convention on Jurisdiction, the applicable law and recognition of decrees relating to adoption*), if the nationality of the foster parents and the foster child are the same, their national law is applied. Any legal consequence of child adoption, either concerning the foster parents or the foster child, is subject to the law of the state where the foster child in concerned has her habitual residence. Any legal consequence of child adoption between the foster child and his biologic family is subject to the law of the state where the foster child in concerned has her habitual residence."

Pursuant to the Bill of 2015, the Principle of Nationality is applied when the foster parents and the foster child have the same nationality.

Other than that, the principle of the habitual residence of the foster child is applied, including when determining the legal consequences of adoption as well as the rights and obligations of an adoption.

The Bill of 2015 refers to the *Conventions on Jurisdiction, The Applicable Law and Recognition of Decrees relating to Adoption*, the Hague Convention of 1965. This is acceptable since the international convention applies the same principle, namely the Principle of Habitual Residence of the foster child. In a case dealing with inter-country adoption in Indonesia, generally referred to as the Galang Island Case<sup>70</sup>, the International Convention of 1965 became the reference point and, furthermore, the Principle of Habitual Residence of the foster child was implemented to determine the case. Therefore, a reference to the convention is indeed acceptable. In relation to this, it will be advisable if the legislators who drafted the Bill of 2015 could add the Hague Intercountry Adoption of 1993 as additional reference besides the International Convention of 1965.

Current Indonesian laws and regulations regarding inter-country adoption reflect the implementation of the Principle of Nationality in determining the applicable law. In addition to it, Indonesia requires that the foster parents have their habitual residence in Indonesia at least 2 years. And after that, the requirements of Indonesia will apply to them. It means that besides the nationality of the party, the habitual residence also applied in Indonesia.

Therefore, if the Bill of 2015 is to be effective, particular intercountry adoption regulations as set out in GR No.54 of 2007 need to be amended, in order to be in line with the Bill of 2015.<sup>71</sup> Or it suffices to remark the thought of the scholar of PIL, Sudargo Gautama, that urge Indonesia to consider the stipulations of intercountry adoption to be according to or in harmony with international conventions of intercountry adoption. To be a contracting state will need another research or more deep thought, however as a starting point, it will be advisable if Indonesia could adopt the principle of the intercountry adoption as mentioned in international conventions.

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<sup>70</sup> See the discussion of Galang Island Case in sub-chapter 5.E above.

<sup>71</sup> Chapter VI of the Bill of 2015.

## VIII.CONCLUSIONS AND RECOMMENDATIONS

### A. CONCLUSIONS

After the above exploration, the conclusions on the Indonesian Inter-country Adoptions and other adoptions that contain foreign elements could be as follows:

1. Legal pluralism in Adoption Law prevails in Indonesia, namely adoption according to Adat Law, Islam Law and National Law are the living law established side by side in Indonesia.
2. Child Adoption is defined as a legal action to move away or to shift a child from the authority of her biological parent(s), legal guardian, or any other party who has responsibility for taking care, educate and raising up the child, into a foster family.
3. The adoption is conducted for the best interest of the children, and this is the primary consideration and the benchmark of all significance.
4. The child adoption does not detach the blood relationship between the foster child and her biological parent(s). This regulation also shows that Indonesia is about to embrace the simple adoption or *adoptio minus plena*, instead of a way to continue the descendant or *adoptio naturam imitatur*.
5. The adoption between Indonesian foster children and the foreign foster parents can only be performed as an *ultimum remedium* or as a final resort.
6. The requirements and process of Intercountry adoption or adoption which has foreign elements are regulated in Indonesia and could be found in several regulations and levels. It means it scattered in Indonesian prevailing rules and regulations.
7. The district court decision of adoption in Indonesia is to consider as the *act of jurisdiction gracieuse*.<sup>72</sup> An adoption is an administrative act in judicial form as the decision is the point of validation of the existence of the adoption.
8. Indonesia Intercountry Adoptions have applied the Principle of Nationality and in determining the requirements and capacity of the parties. Besides the national law requirements, the foster parents to stay at least 2 years in Indonesia where the foster child is staying,

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<sup>72</sup> Sudargo Gautama, Loc. Cit. p.149.

and there are particular requirements to the foster parent which then conclude that Indonesian law and national law of the foster parents are applying simultaneously. It means that besides the Principle of Nationality, the law where the foster parents are having their habitual residence is applied.

9. The district courts are the authorized court to adjudicate and prosecute the Indonesian Intercountry Adoption, as well as the adoption cases which contains a foreign element.
10. Bill of 2015 covers the inter-country adoption and considers the international convention from the Hague Conference of the Private International Law in 1965, *Convention on Jurisdiction, the applicable law and recognition of decrees relating to adoption*. It also mentioned the applicable law to legal consequences of the respective adoptions.

## **B. RECOMMENDATIONS**

1. Intercountry adoption covers the adoption that has a foreign element in the legal relation or in the case. The foreign element could be, for instance, the nationality, of the parents or one of the parents or the child. In another case, the foreign element could be the habitual residence of the foster child. Because those cases are covered as intercountry adoption, it is advisable that those adoptions could be regulated in one regulation and pursuant to the PIL principles.
2. After having a discussion, the author would like to humbly advise that intercountry adoption could consider the principles of PIL in its implementation or in the future. Among others, the Principle National with regards to the substance requirements, with consideration of the appliance of Principle of Habitual Residence after certain of the period of domicile within Indonesia. The Principle of *Lex Loci Celebrationis* for the solemnization.
3. It is advisable that the intercountry adoption regulations regulate the applicable law to the legal consequences of adoption in question. The author would like to advise that the legislator could consider the habitual residence of the respective family and the best interest of the child as the basic principle.
4. Indonesia requires that the foster parent and foster children have the same religion. In the Indonesian society which still considers

that religion is important, such condition is reasonable. Yet the implementation needs more elaboration and though. Therefore, the author kindly suggests that implementing regulations or the district court decisions could give and detail the indications and the process of such determination. If the government cannot provide a fair justification, which in line with the notion of equality of all religions, it is better to leave vacant and let the child determined what he or she believe when he/she has enough capability.

5. It is will be advisable if the Bill of 2015 could include its consideration of the recent international convention adoption, the Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption. The Bill of 2015 and the prevailing regulation needs to be adjusted one to another so that at the moment Bill of 2015 becomes effective those could prevail in harmony.



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